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Supreme Court, U.S.
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No. 03-____

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In the Supreme Court of the United States

October Term, 2003

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Joseph H. White, Jr.,

Petitioner,

v.

John Ault, Warden,
Anamosa State Penitentiary,

Respondent.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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# PETITION FOR A WRIT OF CERTIORARI

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21 pp

## QUESTION PRESENTED

Should the Eighth Circuit Court of Appeals be ordered to issue a Certificate of Appealability so that the Petitioner can appeal the District Court's denial of his action for writ of habeas corpus, pursuant to 28 U.S.C. § 2254. Petitioner's action alleged he was denied the effective assistance of counsel as required by the Sixth and Fourteenth Amendments to the United State Constitution when his trial counsel failed to object to statements made by the Prosecutor during the Prosecutor's rebuttal closing argument?

## PARTIES TO THE PROCEEDING

The Petitioner, Joseph H. White, Jr., is serving a life sentence, without the possibility of parole, following his 1993 State of Iowa convictions on two counts of first-degree murder and one count of first-degree [illegible]ry. He is in custody of the Respondent, John Ault, who is the Warden of the Iowa State Penitentiary at Fort Madison, Lee County, Iowa. John Ault has placed Joseph H. White, Jr. at the United States Penitentiary, Marion County, Illinois.

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## PETITION FOR A WRIT OF CERTIORARI

Your Petitioner, Joseph H. White, Jr., respectfully petitions for a writ of certiorari to review the Judgment of the United States Court of Appeals For the Eighth Circuit's denying Petitioner's request for the issuance of a Certificate of Appealability.

## OPINIONS BELOW

The Order of the Court of Appeals, denying Petitioner's Petition For Rehearing En Banc Or Panel Rehearing is set forth as Appendix, Part (c.), page A-13. The Order of the Court of Appeals, denying Petitioner's request for issuance of a Certificate of Appealability is set forth as Appendix, Part (b.), page A-12. The District Court's Ruling denying Petitioner's petition for writ of habeas corpus is set forth as Appendix, Part (a.), page A-1.

## JURISDICTION

On November 8, 2002, the District Court denied Petitioner's petition for writ of habeas corpus and sua sponte declined to issue a Certificate of Appealability. Petitioner timely asked the Eighth Circuit Court of Appeals to issue a Certificate of Appealability. On March 19, 2003, Petitioner's request was denied and Judgment entered. On April 18, 2003, the Eighth Circuit Court of Appeals denied Petitioner's suggestion for rehearing en banc or panel rehearing pursuant to Rules 35 and 40, respectively, of the Federal Rules of Appellate Procedure. Petitioner now requests a Writ of Certiorari directing the Eighth Circuit to issue the requested Certificate of Appealability. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## RULE INVOLVED

Under Rule 22(b) of the Federal Rules of Appellate Procedure, it is necessary for a Certificate of Appealability to be

issued before the Petitioner may appeal to the Eighth Circuit Court of Appeals the District Court's denial of his petition for writ of habeas corpus.

Where a District Court has rejected a habeas petitioner's constitutional claims on the merits, to obtain a Certificate of Appealability the Petitioner:

> "Must make a substantial showing of the denial of a constitutional right, a demonstration that, [ ], includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.' [citation omitted]."

Flack v. McDaniel, 529 U.S. 473, 484 (2000).

## STATEMENT OF THE CASE

1. Background. On November 29, 1992, several minutes before 7:00 P.M., a young black man, dressed in black, walked into the crowded Drake Diner Restaurant in Des Moines, Iowa. The young man walked behind the cash register, grabbed restaurant manager Cara McCrane and put a gun to her head. He held the gun in his right hand. He asked for money. He shot McCrane in the head. The man took $1,470.00 from the register. Another manager, Tim Burnette, ran toward the gunman and he was also shot in the head. Both McCrane and Burnette died instantly from the gunshot wounds. Police received hundreds of tips about the shooting. One indicated the Petitioner and his cousin were involved. The police questioned the Petitioner on December 5, 1992 and placed him under arrest. During questioning the Petitioner told the police he was left-handed. On February 11,

1993, the State of Iowa filed a Trial Information in the Polk County, Iowa District Court charging the Petitioner with two counts of murder and one count of first degree robbery.

2. Initial Proceedings In The District Court. A jury trial commenced on May 3, 1993. The State's evidence fell into three general categories: evidence concerning the gun used in the shootings, evidence from eyewitnesses to the shootings, and evidence that the Petitioner had spent money after the shootings. As to the gun, on November 5, 1992, Petitioner moved to Des Moines, Iowa to live with his aunt and a cousin. The State proved and the Petitioner admitted that he brought a .44 Magnum Grizzly pistol from Washington to Iowa. The State's expert concluded that the gun Petitioner brought to Des Moines was used in the November 29, 1992 Drake Diner shootings. The Petitioner testified that shortly after coming to Iowa he sold the gun to one Jeremy Spencer. Petitioner's evidence also showed that two weeks before the shootings, during the early morning hours of November 15, 1992, two shots were fired into a house at 1344-22nd Street in Des Moines, Iowa. One bullet struck Isaac Newsome. Newsome testified that Jeremy Spencer apologized to him for the shooting. The State also introduced evidence that on a date between November 30, 1992 and December 2, 1992, the Petitioner was at a house occupied by one Tami Turner during the early morning hours and a .44 Magnum Grizzly was being passed around. The Petitioner was one of the many people who handled the gun. As to eyewitnesses to the shootings, twenty-eight witnesses testified at the trial. Six of the witnesses testified that the gunman wore a mask. One witness thought that the shooter may have worn pantyhose over his face. Three witnesses felt that he wore sunglasses or goggles. Other witnesses described features of a gunman which were inconsistent with the Petitioner's features, such as thin lips, thin face, small nose, small beady eyes with protruding eyebrows, facial hair, height over six feet tall, acne marks on his face, and feminine features. Most of the witnesses agreed that the shooter was a young black man under six feet tall. At the time of

the shooting, the Petitioner, a young black man, was seventeen years old and five foot nine inches tall. Three witnesses testified that Petitioner was the shooter. The three independently identified the Petitioner, with varying degrees of certainty, in a six person photo lineup in the days after the shootings. The photo lineup did not include other young men the police suspected were involved in the shootings who looked similar to the Petitioner. In this regard, evidence was introduced that Petitioner's cousin, who claimed to have been the shooter, had arranged to have an individual testify as an alibi. Other evidence showed that the Petitioner's cousin had been seen around the time of the shooting with a gun that matched the description of the .44 Magnum Grizzly. A fourth witness testified that Petitioner looked very much like the gunman. Contesting the eyewitness testimony, several of Petitioner's family members testified that they saw Petitioner at his aunt's house around the time of the shooting, that he was wearing maroon clothes (not black), and that he looked like he'd just woke up. As to the evidence of the Petitioner spending money after the Drake Diner shootings, the State's evidence showed that the Petitioner spent over $140.00 on December 2, 1992 at the Holiday Inn despite the fact that he had earlier claimed to have no money. When questioned, the Petitioner admitted he'd stayed at the Holiday Inn but that he had only spent $70.00 and that the rest of the money came from his cousin. He further stated that the two had been saving their money for the hotel stay since he'd moved to Des Moines. Petitioner testified, that on the night of the shooting, he was sleeping in his room at his aunt's house. Petitioner admitted that he lied to the police when he told them (on December 5, 1992) he was left-handed. The trial took eight days and was hotly contested. Not only did the Petitioner introduce his own evidence, Petitioner's counsel thoroughly and rigorously cross-examined the State's witnesses and its evidence. The jury deliberated for seven days before they returned their verdicts of guilty.

3. The Prosecutor's Improper Conduct. In Iowa, the Prosecutor opens closing argument, the Defendant then replies, and

the Prosecutor is permitted to reply in rebuttal. During Petitioner's trial counsel's reply closing argument, Petitioner's trial counsel said:

> "And its basically, the State's theory, of course, Mr. White brought that gun to the State of Iowa. That's not in controversy. And that's tremendous police work that disclosed that fact. And had that not been disclosed by good police work, you and I both know that Joe White, Jr., would not have admitted to bringing the gun to the State of Iowa."

In the Prosecutor's rebuttal argument, the Prosecutor stated:

> "And Mr. Wellman tells you with absolute candor that you know darn well when Joe White took the witness stand, if [the Prosecutor] hadn't been able to absolutely prove that the gun came from Washington with Joe White he would have lied to you about that. That's what he told you just a few minutes ago, folks. I'll admit it to you; if my client hadn't known that that son of a gun from the government over there could prove a case against him, he would have lied. That's just what he just told you. And 'if [the Prosecutor] can't prove it, by George, we'll lie about it.' That's what he told you. [Defendant's attorney] tells you: 'We'll lie if they can't prove it to an absolute fact.'"

Petitioner's trial counsel nervously laughed during the Prosecutor's statements and the Prosecutor responded with:

> "I'm glad you're amused, . . .I'm not. I am disgusted that an attorney would stand up here and tell you that; if I can't prove it to you, I'll lie. He is not your government, thank goodness. You'll all ought to thank goodness.

. . . .

> We could have wasted more of those vast resources that your government has that you and I paid for out of our pockets daily [by bringing in more witnesses]. You know what? You and I pay for it out of our pocket books daily because these folks sit here and tell you that we'll lie. . . .and if I couldn't prove it absolutely, they'd lie. And if he thought that being left-handed was important, he'd lie. And if he thought going to the Holiday Inn was important, he'd lie. And if he thought having the gun in his possession was important, he'd lie. And no matter what it was that was important to your government, to you people, because right now today you are the government in this Court, he'd lie. And that's disgusting.
>
> . . . .
>
> It's true, I make choices to which witnesses, [the other Prosecutor] and I make choices. [Defendant's attorney] makes choices. But we won't lie to you."

Petitioner's trial counsel did not object to the Prosecutor's comments. When asked at Petitioner's post conviction hearing, why not, Petitioner's trial counsel stated it was not a strategic decision, he was simply caught off guard. In his opinion, the Prosecutor's statements were without a doubt improper.

## REASONS FOR GRANTING THE WRIT

1. The Eighth Circuit has plainly expressed a "no tolerance" rule for a prosecutors statements that the defendant lied at his trial. In the case of United States v. Splain, 545 F.2d 1131

(8th Cir. 1976), the Eighth Circuit reviewed the following statement made by a Prosecutor in his closing argument:

> "The U.S. Attorney's office also wants to see justice in a case and the U.S. Attorney's office doesn't file a case unless they really feel that there is-a man has committed a crime and we are not intentionally picking on Bobby Splain because he is different than we are or different than you as jury members. We are trying to convict Bobby Splain because he committed a crime and we are convinced of that or we wouldn't be trying him."

Splain, 545 F.2d at 1134-35. The Eighth Circuit Court of Appeals condemned the Prosecutor's statement.

> "Statements such as this have no place in a criminal trial. It is a fundamental principal in our jurisprudence that a man is presumed innocent until proven guilty by a jury of his peers. The question of guilt or innocence rests with the jury and the Prosecutor has no authority to sit as a 'thirteenth juror' and cast a ballot on this issue. The Prosecutor, as a representative of the Government in a criminal trial, must never lose site of his duty to secure justice, to seek acquittal of the innocent and conviction of the guilty. While he may prosecute vigorously, he must do so fairly. In assuming a partisan position and expressing his personal opinion of defendant's guilt or innocence, the Prosecutor is transgressing his inviolate responsibility of objectivity, yet forcefully, presenting the State's case at trial and leaving the ultimate question of innocence or guilt to the jury. A personal expression of defendant's culpability, which inserts an extraneous and irrelevant issue before the jury, is

particularly objectionable and highly improper when made by the Prosecutor, whose position of public trust and experience in criminal trials may induce the jury to accord some unwarranted weight to the comment."

Splain, 545 F.2d at 1134-35. In United States v. Peyro, 786 F.2d 826 (8th Cir. 1986), the Eighth Circuit Court of Appeals reaffirmed its "no tolerance" rule for this type of Prosecutorial misconduct:

> "[the Prosecutor] in response to defendant's counsel's assertion in closing argument that the government witnesses looked like criminals, . . . challenged the opinion, and a coloquy ensued as follows:
>
> > GOVERNMENT COUNSEL: Ladies and gentlemen, Mr. Day suggested that I take the advantage of this opportunity to tell you something with regard to his client that would show his guilt. I don't even have to waste my time with that. You saw this man on the witness stand. You-
> > DEFEMSE COUNSEL; Your Honor, I object to that. There was nothing he did on the witness stand that would indicate his guilt. He denied his guilt.
> > THE COURT: The parties will argue the evidence, please, the jury will recall the evidence. Either side will misstate it at their peril. The Government was invited to make a comment. Proceed and argue the evidence.
> > GOVERNMENT COUNSEL: The man is an obvious liar. He lied on the witness-
> > DEFENSE COUNSEL: Your Honor, I object. I move for a mistrial. That's clearly

> improper argument, contrary to the canons of ethics.
>
> Statements by the Prosecutor such as, 'the man is an obvious liar' have no place in a criminal trial. Judgment must rest with the jury, not the State. 'The Prosecutor has no authority to sit as a thirteenth juror and cast a ballot on the issue.' {citation omitted]."

Peyro, 786 F.2d at 831. In this case, the Prosecutor's misconduct clearly violated the "no tolerance" rule established by the Splain and Peyro decisions. Clearly, Petitioner's trial counsel's failure to object was ineffective assistance of counsel in violation of Petitioner's rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution.

2. The District Court agreed that Petitioner's trial counsel's failure to object was ineffective assistance of counsel. However, the District Court found that, while the statements were improper, they were not prejudicial: i.e., the outcome of the trial would not have been different if not for the alleged constitutional violations. The District Court's reasoning for not finding prejudice was based on the District Court's noting that this was only a single instance of misconduct and the State's evidence supporting the verdicts was strong. While its true, Petitioner's complaint of the Prosecutor's misconduct involves only one incident during the trial, the District Court failed to recognize the significance of the misconduct. The Prosecutor's misconduct denigrated Petitioner's defense as total lies while exalting the Prosecutor's case to a complete truth. The Prosecutor's misconduct occurred at the end of closing statements and just before the jury's deliberations began. The importance of closing argument cannot be overstated. Closing arguments serve to sharpen and clarify the issues for resolution by the trier of fact. After all of the evidence in the case is in and after the parties have rested, the parties are in a position to explain to the

trier of fact their respective versions of the case as a whole. It is only at this point that the parties have any real opportunity to explain the significance of that evidence. It is only then that the parties are in a position to try to convince the trier of fact concerning what inferences ought to be drawn from the testimony, what the weaknesses of the opponents case are, and, for a defendant, why there is a reasonable doubt as to the Defendant's guilt. As this Court stated: "[n]o aspect of . . .advocacy's could be more important than the opportunity to finally martial the evidence for each side before submission of the case to judgment." Herring v. New York, 422 U.S. 853, 862 (1975). The Prosecutor's statements came during rebuttal closing argument. Because Petitioner's trial counsel did not object, there was no response. Instead, the jury was left with the frame of mind that all of the Petitioner's defense was a lie while all of the Prosecutor's case was the truth. The Prosecutor's misconduct not only denigrated the Petitioner, it denigrated Petitioner's trial counsel. Petitioner's trial counsel didn't lie, didn't say that he would lie, or that he would tell the Petitioner to lie. In response though, the Prosecutor told the jury that each and every act and every word of Petitioner's trial counsel was a lie to get a guilty man off. The Prosecutor told the jury that how the defense wanted them to review the evidence (and any inferences to be drawn from it) should be disregarded as lies, that any weaknesses in the State's case were lies, and that any doubt the defense suggested as to Petitioner's guilt was a lie. With this misconduct, the Prosecutor negated Petitioner's entire defense from opening statements through closing arguments. There can be no doubt that the wrong was prejudicial to Petitioner's case. The Prosecutor's misconduct cannot be overstated. The Prosecutor flat out told the jury Petitioner's counsel would lie to them and that he would not. The jury didn't know otherwise. The Prosecutor's own record shows that he was not above lying in court proceedings involving the prosecution of a criminal defense. By order of Iowa's Supreme Court of February 23, 1994, the Prosecutor's law license was suspended for a false statement made by him on April 26, 1991 during his prosecution of a former Des Moines police officer. See

Comm. on Pro. Ethics v. Ramey, 512 N.W.2d 569 (Iowa 1994). This wasn't the first time the Prosecutor had lied in an official proceeding. Iowa's Supreme Court by an Order dated June 15, 1988, suspended the Prosecutor's license for falsely certifying that he had filed his tax returns. Comm. on Pro. Ethics & Conduct v. Ramey, 424 N.W.2d 435 (Iowa 1988). The Prosecutor's statements were designed to inflame the jury. The jury, as the government, could have paid out of its pocket more money to prove the Petitioner's guilt, but shouldn't have to because the Defendant and his attorney would lie, no matter what.

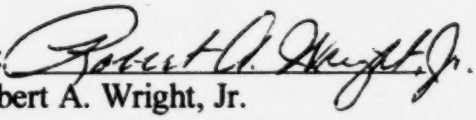
3. The Prosecutors Misconduct Requires A New Trial. A Defendant is prejudiced if the Court finds that it is reasonably probable that, but for the Prosecutor's unprofessional errors, the results in the trial would have been different. Strickland v. Washington, 466 U.S. 668, 694 (1984). There is a reasonable probability that the outcome of Petitioner's trial would have been different if not for the Prosecutor's misconduct. Petitioner was prejudiced. A reasonable probability is a probability sufficient to undermine the confidence in the outcome of the decision. Strickland, 466 U.S. at 694. Petitioner's convictions were not a slam dunk. The jury deliberated for seven days before reaching their verdicts. Each and every time the jury had to resolve whether to believe the defense evidence or prosecution's evidence, resolve the inferences to be drawn from the defense evidence, resolve the inferences to be drawn from the prosecution's evidence, resolve the defense claims of the weaknesses of the State's case, or resolve the likelihood of Petitioner's innocence, the jury was exhorted to side with the government because the government, which they were part of, would not lie, while the defense would lie about everything. Reasonable jurists could find the District Court's assessment of Petitioner's constitutional claim debatable or wrong. A Certificate of Appealability should be issued so that the Petitioner can appeal the District Court's denial of his action for writ of habeas corpus.

## CONCLUSION

For the foregoing reasons, it is so clear that the petition for writ of certiorari should be granted that a reply by the Government isn't called for. The writ should summarily issue and the case remanded to the Eighth Circuit with an order that a Certificate of Appealability issue immediately. For summary treatment see Rogers v. Paul, 382 U.S. 198 (1965) and City of Newport, Ky. v. Iacobucci, Ky., 479 U.S. 92 (1986).

Respectfully submitted,

WRIGHT AND WRIGHT

By: 

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July 15, 2003

## APPENDIX

**(a.) Ruling Denying Petition For Writ Of Habeas Corpus.**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

| | | |
|---|---|---|
| JOSEPH H. WHITE, | * | |
| | * | Civil No. 4-01-CV-90379 |
| Petitioner, | * | |
| | * | |
| v. | * | |
| | * | |
| JOHN AULT, Warden, | * | RULING DENYING |
| | * | PETITION FOR A WRIT |
| Respondent. | * | OF HABEAS CORPUS |
| | * | |

Petitioner, Joseph H. White brings this action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, following his state convictions for two counts of first-degree murder, *see* Iowa Code § 707.1, .2 (1991), and one count of first-degree robbery, id § 711.1, .2. White alleges that he was denied effective assistance of counsel as required by the Sixth and Fourteenth Amendments to the United States Constitution when his trial counsel failed to object to statements made by the prosecutor during the State's rebuttal closing argument. Ault contends in his answer that this claim is procedurally barred because White failed to properly raise it on direct appeal, in his application for postconviction relief, or on his postconviction relief appeal. Ault additionally asserts White was not prejudiced by the prosecutor's remark. White filed a reply, and the case is fully submitted.

## I. BACKGROUND

Shortly before 7:00 p.m. on Sunday, November 29, 1992, an African-American man wearing a black coat walked into the crowded Drake Dinner in Des Moines, Iowa. He entered through two sets of glass doors, walked around the hostess counter at the front of the restaurant and stood next to assistant manager Cara McGrane, who was standing behind the counter. The man then pulled out a gun, placed it to McGrane's head, and ordered another employee to open the cash drawer. The gunman then shot McGrane, who fell to the floor. As patrons ducked for cover, Tim Burnett, the Diner's manager, heard the shot and ran from the back of the restaurant toward the counter. The gunman turned to his right and shot Burnett as he ran. The shooter then grabbed approximately $1470 and fled through a group of customers out the Diner's front doors. McGrane and Burnett died instantly from the gunshot woulds.

Police received hundreds of tips about the shootings in the following days and weeks. One called indicated that Joseph White, who had recently moved back to Des Moines from Washington state, and his cousin, Alf Freddy Clark, were involved in the shootings. Officers questioned White on December 5, 1992, and, based on the evidence recounted below, placed him under arrest. On February 11, 1993, the State filed a three-count trial information charging White with first-degree robbery and two counts of first-degree murder. Trial commenced in the Iowa District Court for Polk County on May 3, 1993. The evidence adduced by the State at trial focused on eye witnesses' identification of White as the gunman and White's ties to the murder weapon, a semi-automatic Grizzly .44 Magnum. Four witnesses at trial identified White as the shooter, and an additional witness said the defendant "looked very much" like the gunman. Three witnesses who identified White in court, two of whom, Jonas Chladek and Scott Birrer, were in front of the counter a few feet from McGrane, and one of whom, Dontrell Ducker, was looking directly at the hostess counter from a

nearby booth, assisted the police in compiling a composite sketch of the gunman. Each of the three independently identified White, with varying degrees of certainty, in a six-person photo line-up in the days after the shooting.They all described the shooter as a young African-American man wearing a black coat with either a hat or hooded sweatshirt pulled down to his eyebrows. Additional witnesses were not able to identify White as the shooter, but provided similar physical descriptions. Chladek, Birrer and Ducker confirmed their identifications during thorough cross-examination by White's counsel, John Wellman.

The State also introduced extensive testimony about the murder weapon, the Grizzly .44 Magnum. Roger Cline, the gun's owner, testified that in October 1992 he found the gun missing from his Fall City, Washington home. Cline's daughter testified that she was friends with White, who lived in nearby Kent, Washington at the time, and that he had been at her house the weekend immediately before the gun turned up missing. Approximately one week later, Kent police responded to reports of gun shots at White's apartment and recovered a .44 Magnum shell casing in the rain gutter outside White's room, which authorities later confirmed was fired by the Grizzly. Officers also recovered a magazine for a .44 Magnum and harness for a shoulder hostler. Three witnesses testified that they saw White with a similar gun in Des Moines in the days before the killings. Moreover, police identified the Grizzly as the weapon used in a shooting during a November 15 party which occurred at a house around the corner from where White was living. At least one witness testified that she saw White running down the alley in the back of the house after she heard gun shots.

Two witnesses, Tamara Turner and Barbara Hogan, also testified that they saw White with a gun after the shootings. In the twenty-four hours after the killings White and others were at a gathering at Turner's residence at 1517 Washington Avenue. White discharged the gun, sending a bullet through the kitchen floor. White and his cousin Alf Freddy Clark tried unsuccessfully to

recover the bullet, but recovered the shell casing and left the house. Police later discovered the bullet in a pipe in the basement, and determined that it came from the gun used to kill McGrane and Burnett. Both Turner and Hogan testified that they did not see who brought the gun into the house, and Turned stated that several people passed it around.

Further evidence showed that several days after the shootings, a group of approximately six people, including White, Clark, Turner and Hogan, checked into the presidential suite at the Des Moines Holiday Inn. One of the people there that night, Richie Newman, testified that White, who Hogan testified had not had enough money to repay her a five-dollar debt in the days before the killings, gave him the approximately $150 to rent the room and additional money for pizza.

The defense focused its case on discrediting the eyewitnesses' identifications and establishing others as the shooter. White called numerous witnesses who were inside the Diner on the night of November 29. These witnesses gave varying descriptions of the shooter, including the fact that he wore various items from a face mask, a hooded sweatshirt, to glasses, stood anywhere from 5'8" to 6'3", and was anywhere from eighteen to twenty-five years old. Others testified they did not see anything covering the robber's face. The witnesses also described his coloring as varying from light to dark. These descriptions varied from each other as well as from descriptions given by prosecution witnesses.

Sergeant Dennis Westover, who created the photo line-up from which witnesses identified White, testified concerning the specifics of how the witnesses made their identifications and the fact that no witness was 100% sure of his or her identification. Officer Larry Reynolds testified that Dontrell Ducker, who at trial identified White by the gap between his front teeth, said during an interview after the shooting that there was possibly a gap in the gunman's teeth, not definitely. Officer Rahn Bjornson testified concerning a

previous photo identification by Scott Birrer, who said in his testimony he was 100% sure White was the shooter, during which Birrer identified an individual named Kevin Jenkins and said he had similar facial characteristics as the shooter. Birrer said that on a scale of one to ten, the similarity between the individual in the photo and the gunman was seven or eight. Officer Bjornson also testified about an individual named Jason Brown, who identified Kevin Jenkins as the shooter. However, the Kevin Jenkins Birrer identified in the first photo array was not the same Jenkins who Brown identified. The jury learned that police in fact charged Brown with making false reports based on statements he gave police identifying Jenkins as the shooter. Brown plead guilty to the charge.

The second set of witnesses White called suggested others had possession of the Grizzly in the days before the shooting. Isaac Newsome, who was shot by a bullet fired from the Grizzly during a party on November 15, testified that a young man named Jeremy Spencer apologized to him for the shooting, leaving Newsome with the belief that Spencer was possibly the person who shot him. Newsome said he did not really know White, but had no reason to think he shot him.

Several of White's family members testified that they saw White at his aunt's house, where he was living, around the time of the Diner killings on November 29. They stated that White was dressed in maroon, not black, the color allegedly worn by the gunman. White's uncle, Gerald James, testified that he was at a bar when he heard about the shooting. He left the bar and drove to the house where White lived and was stopped by the police for approximately five minutes on the way. When he arrived, he walked in the house and saw White sitting on a couch inside the door. He said White looked like he had just woken up, had his shoes off, and was wearing a "purple-ish/pink-ish" outfit.

White testified as the final witness. He stated that his friend in

Washington, who White saw take the Grizzly from the Cline home, had given him the gun as a going-away present. He brought it to Iowa and kept it at his aunt's house, but sold the gun to Jeremy Spencer for $300 about one week after arriving in Des Moines. He purchased another gun shortly thereafter, which he kept at the Washington Avenue house. He denied that he shot Isaac Newsome on November 15. He admitted, however, that he stayed at the Holiday Inn in the week after the shooting. He contended he only spent about $70 out of the $150 he had that night, and denied that the money came from the Diner. White also stated he did not have a job, but that he had saved up money for the hotel stay, which he claimed he and Clark had been planning since White returned to Des Moines. White stated that on the night of the Diner shootings he was sleeping in his room at his aunti's house when his cousin and others woke him up and told him about the shootings. He heard people coming in and out of the house, went downstairs and laid on the couch. He admitted that he was holding the Grizzly at the Washington Avenue house when it accidently went off. He stated, however, that Jeremy Spencer had been passing it around to people in the house and was the person who gave the gun to him.

White further testified that during his December 5, 1992 interview with police he did not tell the whole truth. For instance, White told the questioning officers that he was left handed, but when one officer wrote that down, White lied and said he was also left handed because the information seemed important. White also admitted he lied when he told the police that he had not seen the Grizzly in the week after the shooting and prior to the interview. Only when he concluded that officers knew about the gunshot at the Washington Avenue house, did White tell them he had accidently fired the shot. He also lied and told officers that a person named David had given him the Grizzly that night because he wanted to protect Jeremy Spencer and also wanted the officers to stop questioning him.

During closing arguments White's counsel stated:

And it's, basically, the State's theory that, of course, Mr. White brought that gun to the state of Iowa. That's not in controversy. And that's tremendous police work that disclosed that fact. And had that not been disclosed by good police work, you and I both know that Joe White, Jr., would not have admitted to bringing that gun to the state of Iowa.

On rebuttal, prosecutor James Ramey responded:

And Mr. Wellman tells you that with absolute candor that you know darn well when Joe White took the witness stand, if Mr. Ramey hadn't been able to absolutely prove that the gun came from Washington with Joe White, he would have lied to you about that. That's what he told you just a few minutes ago, folks. I'll admit it to you: If my client hadn't known that son of a gun from the government over there could prove a case against him, he would have lied. That's what he just told you. And if Mr. Ramey can't prove it, by George, we'll lie about it. That's what he told you. Mr. Wellman tells you: We'll lie if they can't prove it to an absolute fact.

White's counsel responded with laughter, to which Ramey retored:

I'm glad you're amused, Mr. Wellman; I'm not. I am disgusted that an attorney would stand up here and tell you that: That if I can't prove it to you, I'll lie. He's not your government, thank goodness. You all ought to thank goodness.

. . . .

We could have wasted more of those vast resources that your government has that you and I pay for out of our pocketbooks daily [by bring in more witnesses]. You know

> what? You and I pay for it out of our pocket books daily because these folks sit here and tell you that we'll lie. . . .And if I couldn't prove it absolutely, they'd lie. And if he [White] thought that being left-handed was important, he'd lie. And if he thought having the gun in his possession was important, he'd lie. And no matter what it was that was important to your government, to you people, because right now today you are the government in this court, he'd lie. And that's disgusting.
>
> . . . .
>
> It's true, I make choices as to which witnesses; Mr. Foritano [the other prosecutor] and I make choices. Mr. Wellman makes choices. But we won't lie to you. . . .

Defense counsel did not object to the statements or move for a mistrial.

After seven days of deliberations, a jury found White guilty on all counts on May 21, 1993. White filed a motion for new trial alleging, *inter alia*, prosecutorial misconduct based upon the statements quoted above. The district court overruled the motion on all grounds. With respect to the prosecutorial misconduct argument, the court concluded that counsel's failure to object to the comments at trial made the argument, as a ground for a new trial, untimely. It further concluded that White did not prove he was prejudiced by the prosecutor's remarks.

On July 20, 1993, the court entered judgments on the verdicts and sentenced White to concurrent terms of imprisonment of not more than twenty-five years for first degree robbery and to two life sentences, one for each first-degree murder conviction.

White then filed a direct appeal alleging numerous errors, including a claim of ineffective assistance of counsel based upon

defense counsel's failure to object to the prosecutor's comments during closing argument. The Iowa Court of Appeals affirmed and, finding the record inadequate to address the ineffective assistance claims, including trial counsel's failure to object to the prosecutor's statements, preserved those claims for postconviction relief. *State v. White*, 530 N.W.2d 77, 85 (Iowa Ct. App. 1994), *cert. denied*, 516 U.S. 888 (1995). The Iowa Supreme Court denied further review.

White thereafter filed an application for postconviction relief, again raising his ineffective assistance claim based on prosecutorial misconduct. Following a June 13, 1997 hearing which included testimony from White's trial counsel, who said he did not object to the prosecutor's statement because he was taken by surprise at the comments, and the district court's review of the videotape of the closing arguments, the court denied the application based in part on its conclusion that the prosecutor's statements did not prejudice White. *White v. State*, PCR No. 32887 (Iowa Dist. Ct. Aug. 21, 1997). On appeal, the Iowa Court of Appeals found that although the prosecutor's remarks were improper, inaccurately characterized defense counsel's statements, and attacked defense counsel's credibility, White did not suffer any identifiable prejudice in light of the strength of the evidence supporting the jury's finding of guilt. *White v. State*, No. 0-2000/97-1735, 2000 WL 278510, at *3 (Iowa Ct. App. March 15, 2000). The Iowa Supreme Court denied White's application for further review on June 16, 2000. White filed this petition on June 21, 2001.

## II. STANDARD OF REVIEW

This court's review of state courts' decisions is governed by the deferential standard set forth in the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). *See* 28 U.S.C. § 2254(d). White must show that the state court proceedings either:

(1) resulted in a decision that was contrary to, or

involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

*Id* § 2254(d)(1)-(2). This court may not substitute its judgment for the state court's, even if this court, in its independent judgment, idsagrees with the state court's decision. *See Williams v. Taylor*, 529 U.S. 362, 411 (2000)(O'Connor, J., delivering the opinion of the Court with respect to Part II); *May v. State of Iowa*, 251 F.3d 713, 716 (8th Cir. 2001). Under the "unreasonabale application" standard, this court may only grant the writ if the state court identified the correct governing legal principles but unreasonably applied those principles to the facts of White's case. *See Williams*, 529 U.S. at 413.

## III. INEFFECTIVE ASSISTANCE OF COUNSEL

Proceeding directly to the merits of the case, White's sole assertion in his petition for habeas relief is that his trial counsel rendered ineffective assistance as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution when he failed to object to or move for a mistrial on the basis of the prosecutor's statements made during the State's rebuttal closing argument. A conviction obtained due to counsel's ineffective assistance is in violation of the Constitution. *Frazier v. Maschner*, 304 F.3d 815, 818 (8th Cir. 2002)(citing *Williams*, 529 U.S. at 375).

Pursuant to *Strickland v. Washington*, 466 U.S. 668, 689-94 (1984), the United States Supreme Court's leading case on this issue, a petitioner must prove that counsel's performance was deficient and that such performance resulted in prejudice. *See Simmons v. Luebbers*, 299 F.3d 929, 932-33 (8th Cir. 2002).

Counsel's performance is deficient if it falls outside a wide range of objectively reasonable assistance required in criminal cases. *Strickland*, 466 U.S. at 688. White must overcome a strong presumption of competency to establish such deficient performance. *Id.* at 689-90. To establish the requisite prejudice, White must show that but for counsel's deficient performance, there is a reasonable probability that the result of the proceedings would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* As emphasized in *Williams*, in the context of an action pursuant to 28 U.S.C. § 2254, White must show that the Iowa Court of Appeals applied the these principles in an objectively unreasonable manner to the facts of his case. 529 U.S. at 413.

In reviewing the denial of postconviction relief, the Iowa Court of Appeals determined that even though the prosecutor's remarks on rebuttal were improper, counsel's failure to object did not likely contribute to the jury's guilty verdicts in light of the strength of the evidence supporting those verdicts. To establish prosecutorial misconduct White must prove that misconduct by the state resulted in prejudice, such that he was deprived of a fair trial. *See State v. Greene*, 592 N.W.2d 24, 30 (Iowa 1999); *State v. Farmer*, 492 N.W.2d 239, 242 (Iowa 1992). A prosecutor's misconduct alone does not justify a new trial; rather, it is the prejudice, if any, that results from the misconduct that prevents a defendant from receiving a fair trial. *Greene*, 592 N.W.2d at 31. Prejudice usually occurs through "persistent efforts to inject prejudicial matter before the jury." *State v. Webb*, 244 N.W.2d 332, 333 (Iowa 1976). Accordingly, the court must consider the entire trial record, whether the alleged misconduct was an isolated incident or one of many incidents, and the strength of the evidence against the defendant. *Greene*, 592 N.W. 2d at 32.

The Iowa Court of Appeals, while noting the improper nature of the prosecutor's comments, characterized evidence of White's guilt as "too overshelming" to sustain a claim of prosecutorial

misconduct. The State's evidence of White's guilt, as apparently credited by the jury, was very strong. However, as is the nature of virtually all evidence, its value rests on underlying credibility determinations. This is exactly the point to which the prosecutor's remarks spoke, specifically addressing White's testimony. Ramey's remarks also mischaracterized Wellman's statements, while simultaneously questioning his veracity. Ramey then juxtaposed this with his assurance that the prosecutors would not lie to the jury.

Turning to the factors in the prejudice analysis, Ramey's statements were an isolated part of a rambling rebuttal closing argument delivered at the end of an eight-day trial that consumed over 1500 pages of transcript. White does not point to any additional evidence of misconduct that suggests either a persistent effort to inject similar statements during the trial or that any such efforst were successful. Furthermore, to the extent that Ramey's statements impugn White's veracity, White accomplished this himself when he admitted during his testimony that he lied to officers in his December 5, 1992 interview. More, as previously noted, Ramey's statement that if the State "hadn't been able to absolutely prove that the gun came from Washington with Joe White he would have lied to you about that," is not at all what Wellman said in his closing statement. White has not made any showing that the jurors accepted Ramey's incorrect characterization rather than understood what Wellman actually said.

Finally, the evidence against White was strong, further weakening any claim of prejudice. The independent eyewitness testimony presented at trial was significant, even in the context of varying descriptions by others. Birrer and Chladek were only a few feet from McGrane when she was shot, and both had a clear view of the gunman. Ducker was also only a short distance away and had a very clear view of the hostess stand. There was also extensive evidence connecting White to the murder weapon before and after the shooting, including testimony that White possessed a similar-looking gun in the days immediately before the shootings.

Additionally, Richie Newman testified that he received about $150 from White to pay for a hotel room in the week after the murder, whereas Barbara Hogan stated that White did not have the five dollars he owed her two days before the killings. In the midst of all this evidence, White does not demonstrate he was prejudiced by the prosecutor's improper remarks, such that there is a reasonable probability that the outcome of the trial would have been different absent those statements.

Consider the strength of the evidence against White and the isolated nature of Ramey's statements after a thorough and searching review of the entire trial record, this court concludes that White has not established the prejudice necessary to prove his claim of prosecutorial misconduct. *Cf, Stringer v. Hedgepeth,* 280 F.3d 826, 829-31 (8th Cir. 2002)(holding that peritioner was not entitled to writ of habeas corpus based on prosecutor's improper questions to witnesses because evidence supporting his guilt, including two eyewitness identifications, was strong, such that peritioner had not shown a rreasonable probability that the outcome of the trial would have been different), *cert. denied,* No. 02-5340, 2002 WL 1664113 (U.S. Oct. 7, 2002). Accordingly, this court further concludes that the Iowa Court of Appeals did not unreasonably apply the principles of *Strickland* in determining that White was not prejudiced by his trial counsel's failure to move for a mistrial. The court of appeals's ultimate conclusion that White did not receive ineffective assistance of counsel is therefore also a reasonable application of *Strickland.* This court must accordingly deny White's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

## IV. RULING

For the reasons stated above, White's petition for a writ of habeas corpus is **DENIED. IT IS ORDERED** that the petition be **DISMISSED**.

DATED this __8th__ day of November, 2002.

/s/ Robert W. Pratt
ROBERT W. PRATT
U.S. DISTRICT JUDGE

**(b.) Judgment (Denying Request For Issuance Of Certificate Of Appealability).**

**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

No. 02-4059

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|---|---|---|
| Joseph White, | * | |
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| Appellant, | * | |
| | * | Appeal from the United States |
| vs. | * | District Court for the |
| | * | Southern District of Iowa |
| John Ault, Warden, | * | |
| | * | |
| Appellee. | * | |

Before McMILLIAN, FAGG, and WOLLMAN, Circuit Judges

**JUDGMENT**

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

(5361-010199)

March 19, 2003

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

**(c.) Order Denying Petition For Rehearing And For Rehearing En Banc.**

**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

No. 02-4059

| | | |
|---|---|---|
| Joseph White, | * | |
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| Appellant, | * | |
| | * | Order Denying Petition for |
| | * | Rehearing and for Rehearing |
| vs. | * | En Banc |
| | * | |
| John Ault, Warden, | * | |
| | * | |
| Appellee, | * | |
| | * | |

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge McMillian did not participate in the vote on the petition for rehearing en banc.

(5128-010199)

April 18, 2003

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit